



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-2529

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198410.

The Office of the District Attorney of the Thirty-Fourth Judicial District (the "district attorney") received a request for any information "pertaining to the arrest, investigation and trial of cause number 20010D01729." You state that you have released some of the responsive information. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor asserts that the requested information has previously been provided to the requestor and the attorney for the criminal defendant in this case. You only acknowledge that the defendant's attorney was allowed to review the state's case file in compliance with court-ordered discovery. This office has ruled that exchange of information among litigants in informal discovery is not considered a voluntary release of information. *See* Open Records Decision No. 579 (1990). Likewise, when a governmental body discloses information because it reasonably concludes it has a constitutional obligation to do so, it can still invoke the law enforcement exception. *See* Open Records Decision No. 454 (1986); *see also Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution is required to provide defense with all potentially exculpatory evidence). You make no representation as to whether or not this information has been previously released to the requestor. Whether this information has previously been voluntarily released is a fact question that cannot be addressed in the ruling process. *See* Attorney General Opinion JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). We therefore must rely on a governmental body's representations with regard to such issues. Based on the district attorney's representation,

we conclude that the district attorney has not previously released any of the requested information that it now seeks to withhold to a member of the public. We will therefore address the district attorney's claim that the submitted information at issue is excepted from disclosure under section 552.108 of the Government Code.

Next, we note that portions of the submitted information include court-filed documents, which are expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022(a)(17). Section 552.108 of the Government Code, which we address below, is a discretionary exception under the Public Information Act ("Act") and, as such, does not constitute "other law" for purposes of section 552.022(a)(17). *See* Open Records Decision Nos. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); 522 (1989) (discretionary exceptions in general). Therefore, the court-filed documents, which we have marked in Enclosures 4 and 7, may not be withheld pursuant to this exception. Although you also assert sections 552.101 and 552.130 of the Government Code as possible exceptions to disclosure for the section 552.022 information found in Enclosure 4, you do not direct us to any law under which the court-filed document is deemed confidential for purposes of section 552.101, and we find that none of the information in this document is subject to section 552.130. Therefore, in accordance with section 552.022, you must release the court-filed document that we have marked in Enclosure 4. However, we note that the court-filed document in Enclosure 7 contains information that is confidential by law. Thus, we will address your section 552.101 argument with regard to the section 552.022 information found in Enclosure 7.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information deemed confidential by statute. The section 552.022 information in Enclosure 7 contains biometric identifiers that are confidential under sections 560.001, 560.002, and 560.003 of the Government Code.¹ These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

¹ These sections, formerly found at chapter 559 of the Government Code as sections 559.001, 559.002, and 559.003, were renumbered by the Regular Session of the Seventy-eighth Legislature, effective September 1, 2003. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2 (78), 2003 Tex. Sess. Law Serv. 4140, 4144.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code. The remaining information in the court-filed document found in Enclosure 7 must be released.

We now address your section 552.108 claim for the remaining submitted information. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state, and provide documentation showing, that cause number 20010D01729 was dismissed. You therefore assert that the district attorney's case file pertains to a case that concluded in a final result other than conviction or deferred adjudication. Based on your arguments and our review of the submitted information, we agree that section 552.108(a)(2) generally applies to the case file pertaining to cause number 20010D01729.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of basic information that must be made available to public). Accordingly, with the exception of basic information that must be released, you may withhold the case file pertaining to cause number 20010D01729 from disclosure pursuant to section 552.108(a)(2) of the Government Code.² We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, the court-filed document we have marked in Enclosure 4 must be released to the requestor. With the exception of the fingerprint information we have marked in the section 552.022 document found in Enclosure 7 that must be withheld pursuant to section 552.101 in conjunction with section 560.003 of the Government Code, the remaining information in the section 552.022 document must be released. With the exception of basic information that must be released, the remaining submitted information may be withheld from public disclosure pursuant to section 552.108(a)(2) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

² Because we are able to make a determination under section 552.108(a)(2), we do not reach your other claimed exceptions to disclosure.

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 198410

Enc. Submitted documents

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(w/o enclosures)